STATE OF MICHIGAN

COURT OF APPEALS

MARK L. GREBNER, BENTON L. BILLINGS, LOTHAR S. KONIETZKO, AUBREY D. MARRON, JOSEPH S. TUCHINSKY, HUGH C. McDIARMID, BERL N. SCHWARTZ, and PRACTICAL POLITICAL CONSULTING, INC.,	FOR PUBLICATION November 16, 2007 9:00 a.m.
Plaintiffs-Appellees,	
v	No. 281814 Ingham Circuit Court LC No. 07-001507-CZ
STATE OF MICHIGAN and SECRETARY OF STATE,	
Defendants-Appellants.	Advance Sheets Version

Before: Meter, P.J., Whitbeck, C.J., and Owens, J.

METER, P.J.

In this case involving the constitutionality of 2007 PA 52 (the act), defendants request that we grant leave to appeal and reverse the order of the lower court that granted plaintiffs' motion for preliminary injunctive relief, deemed the act unconstitutional as a matter of law, and enjoined defendants from conducting the January 15, 2008, presidential primary election. Alternatively, defendants request that we grant leave to appeal and stay the lower court's order pending the outcome of the appeal. We deny leave to appeal and, necessarily, the motion for stay.

The facts of this case are aptly set forth in Chief Judge WHITBECK's dissenting opinion and we see no need to reiterate them here. Moreover, we concur in Chief Judge WHITBECK's conclusion that the act appropriates public property. We disagree, however, with his analysis concerning whether the act appropriates public property "for . . . private purposes." See Const

1963, art 4, § 30.[1] In our view, the act clearly does appropriate the lists in question "for . . . private purposes."

In *Falk v State Bar of Michigan*, 411 Mich 63, 153; 305 NW2d 201 (1981), the petitioner challenged the use of mandatory bar dues "for sponsoring Lawyer Referral, Prepaid Legal Services, Lawyer Placement and the Client Security Fund . . . ." He argued that the expenditures were for private purposes and were not authorized in accordance with Const 1963, art 4, § 30. *Falk, supra* at 153. Justice WILLIAMS, joined by Chief Justice COLEMAN, opined as follows:

> As to the first argument that the expenditure of Bar funds for the challenged activities is not for a public purpose we note that petitioner's analysis of the purpose of the Bar program is inadequate. Except perhaps for the Lawyer Placement Service, none of the programs were instituted nor are presently conducted primarily for the benefit of attorneys even though, admittedly, some attorneys may benefit incidentally. Lawyer Referral and Prepaid Legal Services were created in order to make legal services more accessible to "that segment of the population, which studies have shown runs roughly around 70 percent, who do not consult lawyers for one reason or another, partly out of fear of the unknown and of how much lawyers would charge" (testimony of Michael Franck, Executive Director of the Michigan State Bar). . . . Similarly the purpose of the Client Security Fund is not to insure attorneys for malpractice but to protect the public by reimbursing victims of a defalcation either by clients of lawyers or by a lawyer acting in a fiduciary capacity. Therefore Lawyer Referral, Prepaid Legal Services and the Client Security Fund clearly constitute a permissible public service, rather than a private or local service, within the meaning of Const 1963, art 4, § 30. [*Falk, supra* at 154-155.]

Unlike the programs discussed by Justice WILLIAMS, providing the lists at issue here to political parties[2] does not serve some overriding public purpose while benefiting private individuals "incidentally." In fact, we believe that the converse is true. Providing the lists to political parties primarily serves the parties' interests in promoting their own agendas, even though members of the public may benefit incidentally by obtaining certain types of political information that may aid them in, for example, making election choices.

Chief Judge WHITBECK places a great deal of emphasis on *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465; 242 NW2d 3 (1976). We do not find that opinion controlling. As noted by Chief Judge WHITBECK, in *Advisory Opinion*, the Supreme Court analyzed whether a statute providing for certain state funding of gubernatorial

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[1] As noted in Chief Judge WHITBECK's dissenting opinion, this section states: "The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes."

[2] We agree with Chief Judge WHITBECK's conclusion that political parties are private entities.

elections constituted an appropriation for private purposes within the meaning of Const 1963, art 4, § 30. *Advisory Opinion*, *supra* at 495-497. The Court quoted the following statement from *Gregory Marina, Inc v Detroit*, 378 Mich 364, 394; 144 NW2d 503 (1966):

> "[D]etermination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government. *Such determinations should be made by the elected representatives of the people*." [*Advisory Opinion*, *supra* at 496 (emphasis added).]

We do not find this statement particularly helpful, because the Legislature *did not make a determination* regarding whether providing the lists to political parties serves a public purpose. In our view, it is a stretch to infer that the Legislature viewed the process as serving a public purpose simply because they believed the act would be valid without the assent of two-thirds of the members of each house of the Legislature.

The *Advisory Opinion* Court also cited *Gaylord v Gaylord City Clerk*, 378 Mich 273, 299-300; 144 NW2d 460 (1966), in stating that "[t]he question is whether society at large has an interest in having [certain] individuals benefited." *Advisory Opinion*, *supra* at 496. An examination of *Gaylord* reveals that the proposition in question was derived originally from the Massachusetts case of *Allydonn Realty Corp v Holyoke Housing Auth*, 304 Mass 288, 293; 23 NE2d 665 (1939), and was but one of a long list of factors the *Allydonn* court listed as being relevant to determining whether a service is "public." We do not view the *Allydonn* statement as the ultimate litmus test for whether a statute serves a public purpose. Indeed, using that statement as an ultimate litmus test could potentially lead to absurd results. A statute authorizing public funds to build a shopping mall, for example, could be deemed as having a public purpose because "society at large" might have "an interest" in the increased tax revenues and the convenience provided by the mall.

The act states that

> [a] participating political party may only use the information transmitted to the participating political party . . . to support political party activities by that participating political party, including, but not limited to, support for or opposition to candidates and ballot proposals. [2007 PA 52, § 615c(8).]

"Society at large" might have *some* interest in providing the political parties with access to information concerning which political party's ballot an elector at the presidential primary selected, in that perhaps the political parties will be better able to communicate with potential voters about certain issues or candidates. However, in our view, it is abundantly clear that the primary purpose of providing the lists is a private one: "support[ing] political party activities by . . . participating political part[ies]." *Id.* Providing the lists to political parties allows them to further their private agendas by specifically targeting individuals who have expressed a potential affiliation with a particular political party.

Defendants contend that providing the lists to political parties somehow serves a public purpose by preventing "raiding" and "cross-over voting," i.e., by preventing individuals voting in the primary election from selecting the ballot of a party with which they do not truly identify. It is unclear to us, however, how the act prevents such voting, other than through the implicit threat that the parties will eventually be able to discern if a particular voter did participate in "cross-over voting." Defendants' argument is tenuous and unpersuasive.

The act "appropriat[es] . . . public . . . property for . . . private purposes" and is therefore unconstitutional because it was not assented to by "two-thirds of the members elected to and serving in each house of the legislature . . . ." Const 1963, art 4, § 30.

We briefly address defendants' argument that plaintiffs lacked standing to sue. Certain plaintiffs filed affidavits indicating that they owned property "assessed for direct taxation" in accordance with MCR 2.201(B)(4)(b). Plaintiffs also satisfied the constitutional elements for standing identified in *Rohde v Ann Arbor Pub Schools*, 479 Mich 336, 348; 737 NW2d 158 (2007). They sufficiently alleged an imminent, likely, and particularized injury in fact. Finally, we reject defendants' argument that plaintiffs' complaint did not sufficiently allege a pertinent cause of action under Const 1963, art 4, § 30.

We deny leave to appeal and, necessarily, the motion for stay. We also grant the motion to waive the requirements of MCR 7.209.

OWENS, J., concurred.

/s/ Patrick M. Meter
/s/ Donald S. Owens